

S e p t e m b e r 5 , 1 9 9
F O R P U B L I C A T I O N

I N T H E S U P R E M E C O U R T O F T E N N

A T N A S H V I L L E

S T A T E O F T E N N E S S E E ,

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P l a i n t i f f - A p p e l l e e ,

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(C h e a t h a m C o u n t y

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v .

(H o n . R o b e r t E . B

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A N T H O N Y D A R R E L L D U G H A I R N D E S ,

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D e f e n d a n t - A p p(e) l l a n t .

D I S S E N T I N G O P I N I O N

I d i s s e n t f r o m t h e m a j o r i t y o
m o d i f y t h e d e f e n d a n t ' s p u n i s h m e n t t
F i r s t , I w o u l d h o l d t h a t t h e t r i a l
a u t h o r i t y w h e n i t r e j e c t e d t h e S t a
l i f e s e n t e n c e a n d c o m p e l l e d t h e S t a
p e n a l t y . S e c o n d , I f i n d t h a t t h e f
t o g r a n t a c o n t i n u a n c e w h e n t h e S t a
n o t i c e o f i t s i n t e n t t o s e e k t h e d e
i m p o s i t i o n o f t h a t p e n a l t y .

The record indicates that prior defendant and the State engaged in which the parties agreed that the defendant would receive a life sentence in this case and would receive a different case for which he would receive consecutive life sentences. When the defendant appeared before the trial court, the court adamantly rejected it.

Well, obviously, I presided over prior trial, and I know what facts of this case are, and I think the plea bargain. I think this is a case that ought to be decided by a jury, and I do not think the interest of justice to accept the plea bargain in this case, and reject it.

* * *

From the facts of the commission of the crime, I am of the opinion this case meets the criteria for imposition of the death penalty. I think that the manner in which the deceased was treated was especially heinous, atrocious, and cruel. I did not define that to the jury, but I felt like that our statute then goes on to define "in that it involves torture and depravity of mind." And then take the Potter Stewart approach to that situation, that even though the jury may not have known the legal definition of those terms, "I know it when I see it," and this is certainly, a particularly heinous and brutal crime. And I think it is one in which the citizens of this county should consider the death penalty.

imposition of the death penalty
and that is the reason for my
rejection of the plea bargain

Under the system adopted in Tennessee, it is left to the discretion of the attorney general whether to seek the first degree ~~SEEET~~ under. Crim. s.ePe. 12 alSot a te v., B8i8g5b eSe. W. 2d 797, 8 t a t e T e
v. N i c h o l s S . W . 2 d 7 2 2 , S B a t e T e n n . 1
B r i m,m e8r7 6 S . W . 2 d 7 5 , 8S6t a(tTee nvn,. 817959e4s
S . W . 2 d 253, 268 C o T e n . v,1 989447a tSe. W . 2 d
521, 536 (Tenn. Crim. App. 1992).
district attorney general in this case the language of a plea bargain agreement exercise of his discretion not to prosecute operating as a withdrawal of the prosecution that punishment. It was beyond the trial court to restrict this decision words of the court quoted above should for itself the prerogative reserved general to determine whether the law public good require that the case be offense. The court clearly was acting inasmuch as the district attorney general seek the death penalty, the court would

that determination and enter a sentence.

The majority finds that the trial authority under Tenn. R. Crim. P. 11 plea agreement. This case is not controlled by the court's rejection of the agreement for the State -- to seek the death penalty. The court to restrict the district attorney to these circumstances subverts the authority general to decide whether death penalty. For these reasons, trial court erred in refusing to accept not to seek the death penalty and would life imprisonment. § 39-1-203.

Additionally, the sentence is modified to life imprisonment because mandatory provisions of Tenn. R. Crim. P. 11 requires that, when a capital offense is tried, the district attorney general intends the death penalty,

written notice shall be given if filed not less than thirty (30) days prior to trial. If the notice is filed later than this time, the trial shall be adjourned upon his motion and

reasonable continuance of the
(Emphasis supplied.)

In the present case, the defendant
the State to provide written notice
death penalty and of the aggravation
it would rely at resentencing. The
these motions until the week before
then filed a motion for a continuance
State's failure to give timely notice.

The majority opinion finds the
was not required because the original
State before the first trial provided
sufficient notice to satisfy the Rule.
However, Tenn. Code Ann. § 39-13-200
[formerly Tenn. Code Ann. § 39-2-200]

[i]n the event that the trial
or any other court with jurisdiction
to do so, orders that a defendant
convicted of first degree murder
. . . be granted a new trial,
as to guilt or punishment or
the new trial shall include the
possible punishments of death
life imprisonment.

This statute indicates that upon re-
Assembly intended that the State and

the positions they occupied before sentencing hearing. All possible available to the State. A defendant on notice of any particular intent regarding the penalty. Under these under the guidelines of Rule 12.3(b) resentencing as at the original trial

The facts of this case illustrate necessity. The jury at the first rejected one of the four aggravations by the prosecution. The defendant whether the State would continue to or whether it might seek to present without notice, he was forced to present certain knowledge of the aggravation have to rebut or challenge. The representations were intended to alleviate ~~sue~~ et esnunc.h Run Crim. P. 12.3 Advisory Commission the majority, however, deprives a defendant procedural protections at resentencing case such as this one, where the State to believe that it will not seek the agreeing to a sentence of life, not becomes critical. To avoid misleading State should be required to file a

Rule 12.3(b) before it may proceed on a resentencing hearing.

Rule 12.3(b) mandates that no intent to seek the death penalty in circumstances upon which the State less than thirty days before trial. perform this duty, ~~shall grant the defendant~~ judge upon his motion a reasonable continuance of the trial."

(Emphasis supplied.) As this Court parallel situation under Rule 12.3 (the use of the word 'shall' in a mandatory legislation). W. 2d 526, 527 (Tenn. 1991). Court found the trial court's refusal to sustain the continuance, pursuant to Tenn. R. C. required that the notice of enhancement sentence be vacated and that the defendant if the notice had not been filed. case suggests that we should depart

The majority decision on notice. The decision only finds that the previous case was not reversible error. It reasonable questions regarding notice previously settled, are now unanswered.

If so, how much notice is required? circumstances must be included in the of prejudice a condition for relief given notice as required by the rule abandoning the Spraitnec iv@.l eLso woef

I would modify the defendant in accordance with ¹. Lowe

REID, J.

¹In its opinion, the majority rejected the application of Stephens v. S.W. 2d 80, 81 (Tehmper. o plo g si & jion f & ha) failutre fully notice does not come in due time and therefore does not request a stay. It also found that the specificially distinguished ground.